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## **Carpe Crisis: Capitalizing on the Breakdown of Capitalism to Consider the Creation of Social Businesses**

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CELIA R. TAYLOR

## Carpe Crisis: Capitalizing on the Breakdown of Capitalism to Consider the Creation of Social Businesses

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## CARPE CRISIS: CONSIDERING THE CREATION OF SOCIAL BUSINESSES

*How selfish soever man may be supposed, there are evidently some principles in his nature, which interest him in the fortunes of others, and render their happiness necessary to him, though he derives nothing from it except the pleasure of seeing it.<sup>1</sup>*

*I'm saddened and offended by the idea that companies exist to enrich their owners . . . That is the very least of their roles; they are far more worthy, more honorable, and more important than that. Without the vital creative force of business, our world would be impoverished beyond reckoning.<sup>2</sup>*

The severity of the financial situation facing the world community cannot be overstated. Hundreds of thousands of people are losing their jobs, their homes, and a standard of living that they had learned to take for granted. The economic straits that many average individuals find themselves in are fueling an immense anger at the excesses of the capitalist system. The vitriol unleashed upon AIG for paying bonuses to the very executives who led that corporation to the brink of insolvency aptly demonstrates the public's frustration with the greed and inequity that many believe runs rampant in the current model of corporate behavior. Tempers run hot against those who are perceived to be both the cause and the beneficiaries of the general public's pain. Witness the experience of Fred Goodwin, the former chief executive officer of the Royal Bank of Scotland, whose home and car were vandalized. Or Luc Rousselet, the manager of a 3M factory in France, who was held hostage for two days by workers who were angry at proposed severance packages.<sup>3</sup>

Responses to the crisis facing the world economy are many and varied. There is great casting of blame and looking for scapegoats,<sup>4</sup> as well as many suggestions for new regulatory approaches toward financial markets and corporate governance, including the historic overhaul of finance rules recently proposed by the Obama administration.<sup>5</sup> The changes proposed, among other things, would create a new regulatory authority for consumer products, move private trading of complex insurance instruments onto public exchanges, and prohibit many firms from selling

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1. ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 1 (D.D. Raphael & A.L. Macfie eds., Oxford Univ. Press 1976) (1759).
  2. Dennis Hevesi, *Michael Hammer, Business Writer, Dies at 60*, N.Y. TIMES, Sept. 5, 2008, at B6.
  3. Julia Werdigier & Matthew Saltmarsh, *Hurt By Economy, Europeans Vent Their Anger*, N.Y. TIMES, Mar. 26, 2009, at B1.
  4. See, e.g., Gerald W. McEntee, *An Expectation of Accountability*, WASH. POST, June 15, 2009, at A14 ("As shareholders . . . we have every right to insist that the corporate board be held accountable for its disastrous mismanagement, greed and arrogance."); Editorial, *Payback for Payoffs*, BALTIMORE SUN, Mar. 19, 2009, at 18A ("[I]n its fury, the nation must not forget the recession's larger tragedy of lost life savings, jobs, homes and dreams caused by recent widespread regulatory failure and greed, personal and corporate.");
  5. See Damian Paletta, *Historic Overhaul of Finance Rules*, WALL ST. J., June 18, 2009, at A1. For a discussion of other risks to our economic stability, see Kimberly D. Krawiec, *The Return of the Rogue*, 51 ARIZ. L. REV. 127 (2009) (arguing that rogue trading might be the greatest threat to bank stability and soundness); Todd J. Zywicki & Joseph D. Adamson, *The Law and Economics of Subprime Lending*, 80 U. COLO. L. REV. 1 (2009) (discussing the theories and evidence regarding the causes of the turmoil in the subprime market).

mortgages without keeping some “skin in the game.” Although the main focus of discussion about the economic crisis is directed at its causes and cures, there is another important dialogue taking place. That conversation starts with the idea that what causes despair for many might provide a window of opportunity for others. The prevailing negative public impression of corporations and corporate executives, combined with the perception that the accepted model of capitalism has broken down, provides a chance to rethink the dominant view of corporate behavior and purpose, and may facilitate a re-conceptualization of the basic structure of businesses and ways of harnessing the power of capitalism.

Why is this an opportune moment to challenge the prevalent view of the role of corporations in society? First, the current crisis highlights disparities in wealth and circumstance, strengthening the hand of those who argue that the capitalist system is fundamentally flawed and in need of reform. When even luminaries such as Alan Greenspan admit overestimating the power of the free market,<sup>6</sup> the time is ripe for rethinking the operations of that market. Second, the hardship the collapse of the world economy has caused for so many engenders feelings of compassion and commonality among those whose lives have been thrown into turmoil. Together, these facts indicate that the crisis provides an opportunity to consider how corporations might have a broader focus—one that includes a greater concern with overall societal welfare than corporate entities have traditionally expressed. That broader focus accepts the position that corporations are uniquely positioned in and essential to the world economy and in no way seeks their demise. Rather, it asks if the unequalled power of corporations can be harnessed such that the positive attributes of capitalism work for the common good, rather than for the good of a select few shareholders.

This article will describe some of the many approaches currently being considered for expanding the role that corporations might take in advancing social welfare. As discussed in greater detail below, current approaches generally take two forms. The first advocates that all corporations must act in a socially responsible manner, taking into account the interests of a wide range of stakeholders. Corporate social responsibility advocates a limited, “do no harm” approach toward corporations’ role in promoting social welfare. A “socially responsible corporation” may take into consideration the interests of other stakeholders in the enterprise, including but not limited to employees, customers, and suppliers. Ultimately, however, the corporation remains driven by generating a return for its investors, albeit not as large a return as might be generated if its sole consideration were shareholder wealth maximization.

A second, broader conceptualization of how corporations might advance social welfare considers how individual business entities could work to advance specific social goals and attempt to craft businesses that bridge the for-profit/non-profit divide. Rather than merely considering the interests of a larger group of stakeholders while remaining primarily profit driven, an entity involved in what I call the “active advancement” of social good identifies a social problem and specifically designs a

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6. See, e.g., Edmund L. Andrews, *Greenspan Concedes Flaws in Deregulatory Approach*, N.Y. TIMES, Oct. 24, 2008, at B1.

business to address that problem. Active advancement of social good is a far more wide-ranging model of using corporate power to directly address specific social problems than is simply operating a socially responsible business.

This article will consider the practical and legal impediments that each of these approaches face, and will show that while each approach challenges the notion that corporations must always act solely to maximize its shareholders' profits, neither approach presents a truly new model or a satisfactory alternative. The current crisis presents an opportunity to challenge our conceptualization of the corporate model and to consider expanding our understanding of the structure and function of corporations to enable the vast power of business entities to do more than enrich a limited population. Perhaps we can design a new form of corporate entity that would eliminate the current difficulties entrepreneurs encounter when trying to harness corporate power for social good.

#### **I. HARNESSING CORPORATE POWER FOR SOCIETAL GOOD: HOW ENTITY FORM AFFECTS THE ABILITY TO PROMOTE SOCIAL WELFARE**

The discussion in this article is based on several starting premises. First, it accepts that corporations have the ability and are uniquely situated to advance social welfare. It will not engage in a normative discussion about whether corporate power should be exercised for "good." Instead, it accepts that the active advancement of social welfare is, at times, an appropriate and laudable corporate activity.

Further, it does not define with specificity what constitutes "social good" or "social welfare."<sup>7</sup> Instead, it assumes that at a minimum "social good" involves more than shareholder wealth maximization and the "do no harm" approach of corporate social responsibility advocates. "Social good" means using corporate power to address specific social problems.

Additionally, although this article describes several methods by which the power of corporations might be utilized to advance social welfare, it does not advocate that all corporations, in all situations, must do so. Instead, it suggests that businesses should be able to choose to operate for such a purpose, but that current laws impair the ability of existing business entity forms to achieve that end. Because current entity forms are incapable of allowing entrepreneurs to capture the power of capitalism and utilize it to advance social good, recognition and creation of new entity forms is needed.

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7. As is acknowledged, one single definition of such a term is probably impossible to state in this area. See Christopher M. Bruner, *The Enduring Ambivalence of Corporate Law*, 59 ALA. L. REV. 1385, 1449 (2008) ("Corporate law's ambivalence regarding power constituencies, regarding beneficiaries, and regarding the achievement of the social good, each reflect larger misgivings about the consistency of shareholders' interests and incentives with those of society at large.").

## A. Current Entity Forms

### 1. For-Profit Models

a. *Traditional Corporate Form.* A key point of this article is that because of their potential for efficiency and economies of scale, corporations are uniquely positioned to promote social welfare. The question then becomes, what prevents most corporations from taking on that role in any meaningful way? Can the traditional model of the corporation be used as a vehicle for promoting social good? The long-dominant model of the firm posits that corporate managers must always act to maximize profit for their shareholders and that consideration of other interests violates that obligation. This view was clearly stated in the seminal case *Dodge v. Ford*, which held:

There should be no confusion . . . A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend . . . to other purposes.<sup>8</sup>

This “canonical account”<sup>9</sup> holds that corporate fiduciary duties require directors to further their shareholders’ interests and “thus require[s] them to maximize corporate profits subject to the obligation to comply with independent legal constraints.”<sup>10</sup> The profit-maximizing, shareholder-primacy model of corporate law leaves little room to consider how corporations might act to promote the social good. The model “ignores issues about any effects the corporation may have on the external world,”<sup>11</sup> and focuses exclusively on promoting shareholder value. Indeed, the shareholder-primacy model legally bars corporate managers from acting for the social good if such action does not redound to shareholder benefit.<sup>12</sup>

Although the profit-maximizing model of corporate firm behavior may remain the canonical account, its central premise has long been disputed by proponents of corporate social responsibility (“CSR”).<sup>13</sup> CSR generally refers to the right or responsibility of corporate managers to take into account the interests of a broad

8. 204 Mich. 459, 507 (Mich. 1919).

9. Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV 733, 736–38 (2005). Elhauge argues that the “canonical account” overstates the holding of *Dodge*, which in fact supported expenditures by directors “‘incidental’ to business operations . . . for the benefit of charities or employees, rather than for the ultimate benefit of shareholders.” *Id.* at 773.

10. *Id.* at 736 (collecting citations to scholars advocating this view of the obligation of corporate managers to profit-maximize).

11. *Id.* at 737.

12. See ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 131 (1991). Berle and Means maintained that the corporation did not have a duty to serve society and if directors attempted to do so, they would be acting in violation of their shareholders’ private property rights. *Id.*

13. Corporate social responsibility is just one of the many labels that can be used to describe the position that profit-maximization is not and should not be the sole focus of corporate directors. Advocates of this

range of stakeholders in addition to their corporation's shareholders when engaging in corporate activity. CSR advocates suggest that directors should cause their corporations to take purposeful action to minimize the harmful effects and increase the positive impacts their firm has on the environment, the communities they interact with, and their employees.<sup>14</sup> If CSR were accepted, corporate directors might be able to consider within their decision-making rubric not only profit-maximization for shareholders, but broader societal goals.

There is certainly potential for expanding the corporate model to include the promotion of social good among proper corporate purposes. However, most advocates of CSR take a somewhat more limited approach. Rather than arguing that corporate directors should seek to promote social welfare generally, CSR proponents hope simply to expand the universe of interests directors may consider when taking corporate action.<sup>15</sup>

Even this more limited approach toward encouraging corporations to engage in socially responsible behavior has not been fully accepted. While there has been some movement toward broadening the interests that corporate directors may take into account, as the history of the CSR movement shows, the profit-maximizing model of the corporate form remains firmly in place.

The debate over corporate responsibility traces at least from a debate that took place in the 1930s between Adolf A. Berle and E. Merrick Dodd. Berle adopted the standard shareholder-primacy, profit-maximizing position,<sup>16</sup> while Dodd adopted a broader model of the corporate form that acknowledged a role for CSR.<sup>17</sup> The argument over the proper level of social responsibility that corporations should

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view also refer to it as "progressive corporate law." See, e.g., Kelly Y. Testy, *Linking Progressive Corporate Law with Progressive Social Movements*, 76 TUL. L. REV. 1227 (2002).

14. There are voluminous writings by scholars engaging in the debate over the appropriate role for CSR. See, e.g., Lynn Stout, *Why We Should Stop Teaching Dodge v. Ford*, in *THE ICONIC CASES IN CORPORATE LAW 1* (Jonathan R. Macey ed., 2008); Melvin A. Eisenberg, *Corporate Conduct That Does Not Maximize Shareholder Gain: Legal Conduct, Ethical Conduct, the Penumbra Effect, Reciprocity, the Prisoner's Dilemma, Sheep's Clothing, Social Conduct, and Disclosure*, 28 STETSON L. REV. 1 (1998); David L. Engel, *An Approach to Corporate Social Responsibility*, 32 STAN. L. REV. 1 (1979); Edwin M. Epstein, *Societal, Managerial, and Legal Perspectives on Corporate Social Responsibility—Product and Process*, 30 HASTINGS L.J. 1287 (1979); see generally PHILLIP I. BLUMBERG, *CORPORATE SOCIAL RESPONSIBILITY IN A CHANGING SOCIETY: ESSAYS ON CORPORATE SOCIAL RESPONSIBILITY* (1972).
15. See, e.g., Elhauge, *supra* note 9, at 734; Eisenberg, *supra* note 14, at 1; Engel, *supra* note 14, at 3; Epstein, *supra* note 14, at 1288; BLUMBERG, *supra* note 14.
16. In his article, *Corporate Powers as Powers in Trust*, Berle argued that directors acted as quasi trustees and were charged with acting for "the ratable benefit of all the shareholders as their interest appears." A.A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931). It should be noted that Berle later changed his position on this issue and in 1954 published *THE 20TH CENTURY CAPITALIST REVOLUTION*, in which he accepted Dodd's position that corporate powers were powers in trust not just for shareholders but for the whole community. See ADOLF A. BERLE, *THE 20TH CENTURY CAPITALIST REVOLUTION* 5 (1954).
17. Dodd believed that directors acted as agents for their corporation and as such could "employ its funds in a manner appropriate to a person . . . with a sense of social responsibility without thereby being guilty of a breach of trust." E. Merrick Dodd, Jr., *For Whom are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1161 (1932).

exercise continues to the present day.<sup>18</sup> Without rehashing the entirety of that long debate, some developments are worth noting.

After the Berle-Means debate firmly established the shareholder-primacy model, the issue of CSR entered a long period of relative dormancy. The debate was re-energized in the 1970s as shareholder activists began to utilize the shareholder proposal mechanism of SEC Rule 14a-8.<sup>19</sup> Shareholder proposals were seen as a method to advance CSR by forcing corporations to pay heed to, among other things, the environmental consequences of their actions<sup>20</sup> and the greater social implications of corporate policy.<sup>21</sup> This was exemplified by the efforts of Campaign GM, in which a broad coalition of interested parties attempted to change the dominant conceptualization of the corporation away from a pure shareholder-primacy model and toward one in which corporate directors had duties toward broader constituencies.<sup>22</sup> Efforts to use shareholder proposals to advance social good had limited practical impact.<sup>23</sup> Nonetheless, those efforts were important because they added to the CSR discourse and began to chip away at the shareholder-primacy, profit-maximization model.

CSR again languished, brought low by the failure of the shareholder-proposal movement and by Milton Friedman's ringing critique of CSR, which in essence stated that the only proper action for a corporation was to increase profit for its shareholders<sup>24</sup>—a position that left little room for corporate social responsibility. CSR was revived in response to the increase in merger and acquisition activity that took place in the 1980s.<sup>25</sup> In response to that surge of takeover activity, many states adopted laws known as “constituency statutes.”<sup>26</sup>

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18. A thoughtful treatment of the history of the corporate social responsibility debate can be found in C.A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-First Century*, 51 KAN. L. REV. 77 (2002).
  19. Rule 14a-8 governs the inclusion of shareholder proposals in a company's proxy materials and permits a company to exclude proposals for a variety of reasons, including among others, that the proposal “is not a proper subject for action by shareholders.” 17 C.F.R. § 240.14a-8 (2008).
  20. See Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1246–53 (1999).
  21. See, e.g., *Minnesota ex rel. Pillsbury v. Honeywell, Inc.*, 191 N.W.2d 406 (Minn. 1971) (arguing against Honeywell's military policy); *Med. Comm. for Human Rights v. S.E.C.*, 432 F.2d 659 (D.C. Cir. 1970) (urging Dow Chemical to halt napalm production).
  22. For a detailed description of Campaign GM, see Donald E. Schwartz, *The Public-Interest Proxy Contest: Reflections on Campaign GM*, 69 MICH. L. REV. 419 (1971).
  23. See Wells, *supra* note 18, at 117 (“[M]ost shareholders did not want their firms governed in the interests of the wider community. The few public-interest proposals that reached [GM's] shareholders' hands were overwhelmingly defeated.”).
  24. Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES, Sept. 13, 1970 (Magazine), at 32.
  25. See Roberta Romano, *A Guide to Takeovers: Theory, Evidence and Regulation*, 9 YALE J. ON REG. 119, 129–31 (1992).
  26. Corporate constituency statutes generated a great deal of scholarly writing. See, e.g., Mark E. Van Der Weide, *Against Fiduciary Duties to Corporate Stakeholders*, 21 DEL. J. CORP. L. 27 (1996); Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 GEO. WASH. L. REV. 14 (1992).



Corporate constituency statutes codify the right (or obligation) of directors to consider interests of constituents other than shareholders when making business decisions. Depending on how the statute is drafted, those constituents may include employees, consumers, suppliers, and the local community.<sup>27</sup> Constituency statutes were originally conceived to protect the directors of target corporations—allowing directors to take into consideration interests beyond profit-maximization, and thus enabling them to reject disfavored offers.<sup>28</sup> CSR advocates quickly seized on the statutes, noting that such statutes “offered a more capacious view of directors’ fiduciary duties . . . . Almost inadvertently, the legal mechanism for corporate social responsibility seemed . . . to have been put in place.”<sup>29</sup>

As with the efforts to use shareholder proposals to advance CSR, corporate constituency statutes have not fulfilled the promise they initially seemed to offer. While they remain the law in at least thirty-one states, Delaware has not enacted such a provision. And while some cases refer to the statutes as a reason for directors to consider long-term, non-shareholder interests when making business decisions,<sup>30</sup> there is surprisingly little analysis of the legality and applicability of constituency statutes.<sup>31</sup> Interest in corporate constituency statutes as a vehicle for advancing CSR has largely faded.

Despite the lack of success it has achieved, the CSR debate has not been silenced and many scholars still actively promote a conceptualization of the corporation that expands directorial duty beyond profit-maximization. However, other scholars just as vocally argue that while corporate managers necessarily have significant discretion, including attending to non-shareholders’ interests, the increase in this discretion desired by CSR proponents would require overhauling corporate governance to give

27. See, e.g., OHIO REV. STAT. ANN. § 1701.59(E)(1) (2010); MO. REV. STAT. § 351.347 (2009).

28. See Comm. on Corp. Laws, A.B.A. Bus. Law Sec., *Other Constituency Statutes: Potential for Confusion*, 45 BUS. LAW. 2253, 2253 (1990).

29. Wells, *supra* note 18, at 128.

30. See *Baron v. Strawbridge & Clothier*, 646 F. Supp. 690, 697 (E.D. Pa. 1986) (stating that Pennsylvania law requires a director to oppose a tender offer that is harmful to the corporation’s long-term interests, even at the expense of short-term shareholder interests); *Thompson v. Cent. Ohio Cellular, Inc.*, 639 N.E.2d 462, 469 (Ohio 1994) (stating that directors “must” consider interests of shareholders and “may” consider interests of creditors); *Georgia-Pacific Corp. v. Great N. Nekoosa Corp.*, 727 F. Supp. 31, 33 (D. Me. 1989) (“Maine law suggests that the Directors of a corporation, in considering the best interests of the shareholders and corporation, should also consider the interests of the company’s employees, its customers and suppliers, and communities in which offices of the corporation are located.”); *Murray v. Conesco, Inc.*, 795 N.E.2d 454, 458–59 (Ind. 2003) (citing constituency statute to state the rule that the director’s decision was valid because it was made in the interest of the corporation as a whole to remove a director that the shareholders had voted onto the board); *Keyser v. Commonwealth Nat’l Fin. Corp.*, 675 F. Supp. 238, 241, 265 (M.D. Pa. 1987) (“[T]he Board could consider so-called social issues in evaluating merger proposals.”).

31. See Lynda J. Oswald, *Shareholders v. Stakeholders: Evaluating Corporate Constituency Statutes Under the Takings Clause*, 24 IOWA J. CORP. L. 1, 8–9 (1998).

non-shareholders a direct role in governance.<sup>32</sup> These scholars further note that “managers released from a duty to account to shareholders would be freer to serve both their own interests and those of society. It is not clear that managers freed from the shareholders would serve society rather than themselves.”<sup>33</sup>

The continued resistance toward CSR suggests that the shareholder-primacy model will continue to predominate. Moreover, to the extent that CSR proponents make inroads into the shareholder-primacy, profit-maximization model, their progress will always be constrained. Considering the interests of a broader constituency of those impacted by corporate action may increase the ability of corporate managers to cause their entities to act for social “good,” but that good will still be measured by good redounding to the corporation, albeit in a broader fashion and perhaps on a longer time frame. This is what I think of as limited, “do no harm” social responsibility—corporate directors may cause their corporations to take actions that benefit stakeholders other than shareholders, but only in limited ways.

This type of “do no harm” CSR is quite different from an “active-advancement” model of social responsibility. An active-advancement model would allow and encourage corporate managers to further interests that might not have any direct connection to the welfare of their shareholders and to do so simply for the sake of promoting social welfare. The constraints of the shareholder-primacy model make it unlikely that traditional corporate structure will succeed in furthering an active-advancement model of social engagement for corporate activity.

*b. Limited Liability Corporations.* The traditional corporate model has been subject to variation over time, and the limited liability corporation (“LLC”) model has a number of advantages over the traditional corporate model that make it an attractive alternative to consider as a vehicle for using the power of business to further social goals. In most jurisdictions, including Delaware, the law allows LLC organizers a great deal of flexibility to create essentially any management structure they prefer.<sup>34</sup> For example, an LLC can include non-economic ownership interests and can establish voting interests in any manner desirable.<sup>35</sup> LLCs need not comply with federal regulations and standards imposed upon publicly traded corporations or the listing standards of the various exchanges if they do not trade publicly. Perhaps most importantly, under Delaware law, LLC organizers may contractually limit or eliminate fiduciary duties of owners and members to each other, to the entity, and to any third party to the LLC’s operating agreement.<sup>36</sup> The ability to eliminate or

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32. See generally Larry Ribstein, *Accountability and Responsibility in Corporate Governance*, 81 NOTRE DAME L. REV. 1431 (2006).

33. *Id.* at 1460–61 (citations omitted).

34. DEL. CODE ANN. tit. 6, § 18-110(b) (2005). “[T]he policy of [Delaware’s LLC statute is] to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements.” *Id.* at § 18-1101(b).

35. *Id.* at §§ 18-301(d) (non-economic ownership interests), 18-302(a) (voting interests).

36. *Id.* at § 18-1101(c). This ability cannot be exercised to eliminate the obligation of good faith and fair dealing. *Id.*

restrict fiduciary duties creates the possibility that an LLC's operating agreement could state that its mission is social good, not profit-maximization. A contractual agreement eliminating the fiduciary duty of members or managers to conform to a shareholder-primacy, profit-maximization model could theoretically remove the legal concerns facing such a business organized in the traditional corporate form. These flexibilities in ownership and control could encourage the creation of a business with the specific goal of furthering social good.

Although the LLC form presents some opportunities for those organizing businesses with explicit social goals, at this stage of development several impediments remain. First, LLCs that do social work will not receive the tax advantages provided to non-profit organizations as they will be subject to ordinary LLC regulation and therefore might not be as attractive an investment vehicle for social contributors. Further, although the law permits contractual limitations on fiduciary duties, the complete elimination of them in the manner suggested above has yet to be tried, and therefore has yet to be tested. Additionally, the LLC model was designed with specific purposes in mind.<sup>37</sup> It was not intended to allow businesses to actively advance social good. While the model may be flexible enough to accommodate such ventures, there might be problems of signaling and identification of the goals and mission of any particular LLC, and confusion between traditional LLCs and socially intended LLCs. Clarity in the marketplace is important and therefore a straight LLC model may not be the best alternative to use when organizing a business with the purpose of advancing social good.

But wait. Traditional corporations and LLCs do not need to be able to actively advance social good if other business models can meet that goal. Perhaps the non-profit model is sufficient to advance the broader agenda of harnessing corporate power to advance social welfare. After all, the goal of non-profits is precisely the active advancement of social good. However, although non-profits can and do engage in admirable work in this regard, they, like for-profits, are limited by legal and practical constraints.

## 2. *Non-profit models.*

Can the non-profit model be used effectively to harness the power of corporate action to promote social welfare? The first hurdle facing non-profits is that the power of capitalism stems in large part from its profit-making capacity, seemingly the very antithesis of the non-profit model. A business barred from generating profit cannot take maximum advantage of the power of the market.

This impediment has been reduced somewhat over time. Traditionally, there was a strict divide between for-profit and not-for-profit entities, and non-profits could not engage in any profit-producing activity. Today, however, while non-profits are still quite limited in the extent to which they may generate profit, current legal

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37. LLCs had their genesis in Wyoming. See Craig Langstraat & Dianne Jackson, *Choice of Business Tax Entity After the 1993 Tax Act*, 11 AKRON TAX J. 1, 5 (1995). They were designed as an entity to combine pass-through attributes of the partnership with a limited liability characteristic. *Id.*

regimes do not entirely bar them from doing so. Increasingly, non-profit entities are linking with a for-profit venture, or adding a profit-making component to their activities. This enables the non-profit to secure more steady and predictable funding, and allows it to harness the power of the market to generate resources to further a social welfare agenda.

Despite a loosening of legal restrictions in this area, there remain significant constraints on the ability of a non-profit organization to add for-profit activities to the mix. To qualify for tax-exempt status under section 501(c)(3) of the Internal Revenue Code, an organization must satisfy both an organizational and an operational test.<sup>38</sup> The organizational test examines whether the entity is organized primarily for charitable purposes.<sup>39</sup> The organizational test considers the relationship between the non-profit entity's mission, its charitable activities, and the profit-making component of its activities.<sup>40</sup> For an organization to be deemed exempt, its main activity must be charitable; any for-profit activity conducted by it must be both "incidental" to the non-profit activity and related to the entity's charitable purpose.<sup>41</sup>

A more serious concern for a non-profit entity seeking to engage in profit-making activities is the operational test. Under this test, an entity must operate primarily for one or more exempt purposes.<sup>42</sup> The pursuit of profit is usually not considered among the exempt purposes for which a non-profit may operate, and under the operational test only an insubstantial part of the non-profit's activities can be in furtherance of a non-exempt purpose.<sup>43</sup> The difficulty for a non-profit organization is trying to determine what level of for-profit activity will be considered insubstantial. The cost of misjudging that question is high as it could lead to the loss of exempt status.<sup>44</sup>

Even if a non-profit conducts for-profit activity in a way that satisfies both the organizational and operational tests and achieves exempt status it must still pay unrelated business income tax. Known as UBIT, this tax attaches to all profits that result from trade or business regularly carried out and not substantially related to the performance of the organization's exempt purpose.<sup>45</sup> The requirement to pay UBIT

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38. Treas. Reg. § 1.501(c)(3)-1 (as amended in 2008).

39. Although I.R.C. § 501(c)(3) states that to be exempt an entity must be organized "exclusively" for charitable purposes, the provision is interpreted to mean "primarily" rather than solely. Treas. Reg. § 1.501(c)(1) (as amended in 2008).

40. See Treas. Reg. § 1.501(c)(3)(b)(ii) (as amended in 2008).

41. See *Pulpit Res. v. Comm'r*, 70 T.C. 594, 610 (1978); *Am. Inst. for Econ. Research v. United States*, 302 F.2d 934, 938 (1962).

42. See Treas. Reg. § 1.501(c)(1) (as amended in 2008).

43. See John M. Strefeler & Leslie T. Miller, *Exempt Organizations: A Study of their Nature and the Applicability of the Unrelated Business Income Tax*, 12 AKRON TAX J. 223, 236 (1996).

44. This difficulty is discussed in Thomas Kelley, *Rediscovering Vulgar Charity: A Historical Analysis of America's Tangled Nonprofit Law*, 73 FORDHAM L. REV. 2437, 2438-39 (2005).

45. I.R.C. § 513(a) (2000); Treas. Reg. § 1.513-1(a) (as amended in 2007). For example, a university that operates athletic facilities for its students may be subject to UBIT if it makes those facilities and personnel available for the conduct of a summer tennis camp. See Rev. Rul. 76-402, 1976-2 C.B. 177.

poses another disincentive for non-profits to engage in profit-making activities by adding to the costs and complexities of their operations.

In addition to restrictions on the types of activities non-profits may engage in and the tax burden they face if they engage in for-profit activities, non-profit entities are limited in their ability to access capital. Law prohibits non-profits from “distributing profits, or net earnings, to individuals who exercise control over [them], such as its directors, officers, or members.”<sup>46</sup> This prohibition has the effect of barring non-profits from equity capital markets as they are unable to generate a return for investors. This prevents non-profits from being fully able to harness the power of capitalism to further their social goals as they remain primarily dependent on grants and philanthropic donations for their survival and must pay high costs for capital if such aid is not available.

Despite these hurdles, some non-profits manage to conduct profit-making activities without compromising their exempt status. For example, Underwriter Laboratories (“UL”) is an independent product safety certification organization that is a non-profit, exempt entity.<sup>47</sup> But through the use of fees charged for safety certification, UL generates revenue to further its objectives. Similarly, Business for Social Responsibility is an exempt organization that works with businesses to develop sustainable business strategies and solutions.<sup>48</sup> The organization sustains itself by charging for memberships and conferences, and by operating a bookstore.<sup>49</sup>

Some non-profits that do not themselves engage in profit-making activities try to enhance their ability to attract external funding by qualifying to receive program-related investments (“PRIs”). PRIs are investments made by foundations that have as their primary goal the furtherance of the foundations’ missions.<sup>50</sup> A foundation may make a PRI in a non-profit that aligns with the foundation’s goals. Unlike a traditional grant, a PRI is a financial instrument that can generate a return for the foundation from the non-profit entity in which it invests. Thus, PRIs are a way for non-profits and foundations to more closely model the for-profit world, offering foundations engaging in them both financial and programmatic returns.

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46. Henry B. Hansmann, *Reforming Nonprofit Corporation Law*, 129 U. PA. L. REV. 497, 501 (1981).

47. Underwriter Laboratories, About, <http://www.ul.com/global/eng/pages/corporate/aboutul/> (last visited Mar. 11, 2010).

48. Business for Social Responsibility, About: How We Work, <http://www.bsr.org/about/how-we-work.cfm> (last visited Mar. 11, 2010).

49. Business for Social Responsibility, Membership Policies and Benefits (2009), [http://www.bsr.org/membership/members-only/Membership\\_Policy\\_Benefits\\_10.31.08\\_new.pdf](http://www.bsr.org/membership/members-only/Membership_Policy_Benefits_10.31.08_new.pdf).

50. See Carter G. Bishop, *The Deontological Significance of Nonprofit Corporate Governance Standards: A Fiduciary Duty of Care Without a Remedy*, 57 CATH. U. L. REV. 701, 764 (2008). A PRI may take many forms, including an equity investment, a loan or a loan guarantee, though to be valid it must satisfy several requirements. Specifically, (1) the investment’s primary purpose must be to accomplish one or more of the foundation’s exempt purposes, (2) production of income or appreciation must not be a significant purpose, and (3) influencing legislation or taking part in political campaigns on behalf of candidates may not be a purpose. See generally, IRS.gov, Private Foundations (Sept. 24, 2009), <http://www.irs.gov/charities/charitable/article/0,,id=96114,00.html>.

Additionally, non-profit recipients of PRIs benefit from access to capital at lower rates than might otherwise be available.<sup>51</sup> Providers of PRIs benefit both because their investment furthers their stated mission and because the funds used for PRIs return to them and can be reused, which perpetuates the charitable cycle.

In theory, PRIs could provide non-profits a valuable source of revenue—they are beneficial for both provider and recipient, are flexible, and make economic sense. By allowing a return on investment in the non-profit context, PRIs narrow the gap between the for-profit and not-for-profit model and offer a way to harness some of the power of capitalism to further social good. However, in practice, PRIs are not widely used.<sup>52</sup> There are two primary reasons why PRIs do not occur with more frequency. First, making a PRI requires complex documentation, comparable to making a market-rate investment, thereby increasing legal and administrative costs.<sup>53</sup> Further, there is no coordinated market for PRIs, limiting the ability of smaller foundations to enter the field, even if they would like to participate in such investments.

Over time, the use of PRIs may expand. They certainly represent an important opportunity for the non-profit sector and should be supported. At present, however, similar to for-profit corporations, the practical and legal constraints on non-profit entities prevent them from being able to fully utilize the power of capitalism to actively advance social welfare. Perhaps a new form of business entity would be better situated to do so. With that idea in mind, social entrepreneurs have begun to craft new business models.

### 3. “Fourth-Sector” Businesses: For-Profit/Non-Profit Hybrids

As discussed above, there are significant hurdles facing those who wish to run businesses for the explicit purpose of furthering social good. The corporate form, with its emphasis on shareholder primacy and profit-maximization, is not well designed to further that goal. The non-profit form, while permitting the express pursuit of social welfare objectives, presents organizational, operational, and funding constraints. Recognizing the limitations inherent in each model, creative individuals are trying to design hybrid models that draw from the best aspects of both the for-profit and not-for-profit models while overcoming the shortfalls of each.<sup>54</sup> Led by prominent entrepreneurs (who admittedly have the economic resources to experiment in ways that others might not), hybrid business proponents have devised a variety of business models designed to bridge the divide between the for-profit and non-profit

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51. See Michael D. Gottesman, Comment, *From Cobblestones to Pavement: The Legal Road Forward for the Creation of Hybrid Social Organizations*, 26 YALE L. & POL'Y REV. 345, 347–50 (2007).

52. “Of the many thousands of grant-making foundations in the United States, only a few hundred make PRIs. In addition, relatively few PRI funders maintain formal PRI programs or make PRIs on an annual basis (about one out of three).” Foundation Center, *Frequently Asked Questions*, <http://foundationcenter.org/getstarted/faqs/html/pri.html> (last visited Mar. 11, 2010); see also Gottesman, *supra* note 51, at 350.

53. See Donald S. Chernoff, *Program-Related Investments: A User-Friendly Guide* (2005), available at [http://www.community-wealth.org/\\_pdfs/tools/pris/tool-macarthur-pri.pdf](http://www.community-wealth.org/_pdfs/tools/pris/tool-macarthur-pri.pdf).

54. Gottesman, *supra* note 51, at 346.

worlds. These hybrid efforts are frequently referred to as “creative capitalism,” “social entrepreneurship,” and “fourth-sector businesses.”

A recent book, *Creative Capitalism: A Conversation with Bill Gates, Warren Buffet, and Other Economic Leaders*, demonstrates the growing popularity of these hybrid efforts.<sup>55</sup> The book is a compilation of essays and commentary on capitalism, philanthropy, and global development that takes as its starting point a speech Bill Gates delivered at the World Economic Forum in Davos.<sup>56</sup> In that speech, Gates acknowledged that many of the world’s problems are too big for philanthropy—even on the scale of the Gates Foundation<sup>57</sup>—and that free-market capitalism would need to help solve them.<sup>58</sup> The book notes, “if more corporations are going to be ‘creative,’ then we surely need to consider new contractual forms that reflect the fact that firms may want to do other things in addition to making money for their shareholders.”<sup>59</sup>

Businesses attempting to bridge the divide between traditional profit-maximizing corporations and standard forms of non-profit organizations have achieved varying degrees of success. Although the precise structure varies widely from firm to firm, hybrid models typically include some linkage between a for-profit corporation and a non-profit charitable endeavor. Most commonly the genesis of a hybrid entity comes from a non-profit that seeks to expand its funding possibilities through the linkage. To achieve this, a non-profit might establish a wholly owned, for-profit subsidiary, or enter into a joint venture with or make a minority investment in such an entity.

One leading example of a fourth-sector venture is the Omidyar Network. Started by eBay founder Pierre Omidyar, the organization “has completely abandoned the traditional foundation structure [to fund] . . . both for-profit and non-profit projects that will add up to social good and market-rate returns.”<sup>60</sup> The Omidyar Network is a philanthropic investment firm “dedicated to harnessing the power of markets to create opportunity for people to improve their lives.”<sup>61</sup> The venture consists of both a 501(c)(3) entity and an LLC, using the latter to invest in for-profit entities, and the former to make grants. “Omidyar Network is based on the belief that businesses can create extraordinary opportunity and value, and that market-based solutions can generate significant social returns . . . [and] that sustainability, innovation, and

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55. CREATIVE CAPITALISM: A CONVERSATION WITH BILL GATES, WARREN BUFFET, AND OTHER ECONOMIC LEADERS (Michael Kinsley ed., Simon & Schuster 2009) (2008).

56. *Id.* at 7.

57. For a brief overview of amounts spent by the Gate Foundation, see BILL & MELINDA GATES FOUNDATION, 2008 ANNUAL REPORT 18–23 (2008), available at <http://www.gatesfoundation.org/annualreport/2008/Pages/2008-annual-report.aspx>.

58. CREATIVE CAPITALISM, *supra* note 55, at 18, 41.

59. *Id.* at 62.

60. Douglas McGray, *Network Philanthropy: The Men Behind Ebay are Leading a High-Tech Revolution that is Turning Charitable Giving on its Head*, L.A. TIMES, Jan. 21, 2007, at 14.

61. Omidyar Network, About Us: Evolution, [http://www.omidyar.com/about\\_us](http://www.omidyar.com/about_us) (last visited Mar. 11, 2010).

scale are . . . hallmarks of the private sector that are critical to addressing the global challenges humans face today.”<sup>62</sup>

Another well-known social enterprise is Google.org, a for-profit company with the stated purpose of taking on social issues. The company’s founders, Sergey Brin and Larry Page, have stated its general vision as “Don’t be evil. We believe strongly that in the long term, we will be better served—as shareholders and in all other ways—by a company that does good things for the world even if we forgo some short term gains.”<sup>63</sup> Google.org was funded with a grant of three million shares in Google.com’s initial public offering.<sup>64</sup> Google has also pledged to contribute one percent of its annual profits to Google.org.<sup>65</sup> As of January 2008, Google has committed \$75 million in investments and grants to Google.org.<sup>66</sup> While it, like other companies’ foundations, makes grants, Google.org is untraditional in that it also makes for-profit investments, encouraging Google employees to participate directly and lobbying public officials for changes in policies.<sup>67</sup> Google.org also manages the Google Foundation, a 501(c)(3) organization whose stated goals are similar to those of Google.org.<sup>68</sup>

Another example of a hybrid business is Pacific Community Ventures (“PCV”), which is a 501(c)(3) organization that “helps companies in traditionally overlooked areas [] gain access to capital, business advice, and critical business resources that will accelerate company growth.”<sup>69</sup> The 501(c)(3) is paired with a for-profit investment venture, Pacific Community Ventures Investment Partners.<sup>70</sup>

Similarly, the Emancipation Network pairs a 501(c)(3) organization with a for-profit corporation to fight slavery through business development.<sup>71</sup> Specifically, the venture uses tax-exempt donations to the 501(c)(3) entity to help slavery survivors

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62. Collaborative Media Innovation, Innovators, [http://www.imcollaborative.com/index.php?option=com\\_content&view=article&cid=5&Itemid=21](http://www.imcollaborative.com/index.php?option=com_content&view=article&cid=5&Itemid=21) (last visited Mar. 11, 2010).

63. Larry Page & Sergey Brin, Amendment No. 9 to Registration Statement (Form S-1), Letter from the Founders: “An Owner’s Manual” for Google Shareholders (Aug. 18, 2004).

64. Eric Auchard, *Google.org Expands Funding to Attack World Crises*, REUTERS, Jan. 17, 2008, <http://www.reuters.com/article/idUSN17226771>.

65. Google.org, About Us: What is Google.org?, <http://www.google.org/about.html> (last visited Mar. 11, 2010).

66. *Id.*

67. See Majorie Kelly, *Not Just for Profit*, STRATEGY + BUS., Spring 2009, at 1, 8, available at <http://www.strategy-business.com/media/file/enews-02-26-09.pdf>.

68. For more information on the Google Foundation, see Google.org, The Google Foundation, <http://www.google.org/foundation.html> (last visited Mar. 11, 2010).

69. See Pacific Community Ventures, About Us, <http://www.pacificcommunityventures.org/about-us/> (last visited Mar. 11, 2010).

70. *Id.*

71. See The Emancipation Network, About TEN, <http://www.emancipationnetwork.org/aboutus.html> (last visited Mar. 11, 2010).



establish profitable businesses, and then uses the profits from those businesses to fund the 501(c)(3) entity.<sup>72</sup>

Using a hybrid model offers several advantages to those wishing to operate a business for the active advancement of social welfare. First, the model offers the non-profit component greater flexibility to generate resources. For example, the for-profit unit of the venture may be able to generate profit that the non-profit is not eligible to pursue. Further, the for-profit unit could sell stock to investors, thereby tapping a revenue source otherwise unavailable to the non-profit. The for-profit can then donate some portion of the proceeds from the sales of stock to the non-profit. In either scenario, the ability of the for-profit component to donate its proceeds to the non-profit provides a more certain revenue stream to the non-profit than if it had to rely exclusively on philanthropic donations.

The use of a hybrid business model poses significant hurdles as well. Importantly, if the non-profit controls the for-profit, then any income from rent, royalties, or interest that the non-profit component receives will be subject to UBIT.<sup>73</sup> Another serious impediment is the lack of knowledge about the legal consequences of linking for-profit and non-profit entities. Is it true, as one hybrid business participant supposes, that “as long as there is an inside relationship between the entities (in our case 1 common employee between the two) then the non-profit cant [*sic*] in any way help the for profit?”<sup>74</sup> Currently, many fourth-sector participants feel stymied by the complex and contradictory legal regulation of hybrid business models. As one fourth-sector participant noted, “[o]ur hybrid is an integration of both for-profit and not-for-profit methodologies and we couldn’t find anywhere yet [*sic*] a legal system that can accommodate us.”<sup>75</sup>

In addition to lack of knowledge of the legal implications of melding the quite disparate worlds of for-profit and non-profit entities, there are cultural differences in the approach to the business operations of each that may impede an effective marriage of the two. There are also potentially problematic reputational issues that may arise from linking a profit-making venture with a philanthropic entity. Further, some fear that a bifurcation may dilute important organizational strength and clarity of vision by “forcing the entity into a multiple, de-centralized organizational structure,” and that while such a structure may at times be beneficial, there are times, “particularly in the early stages of the organization’s development, that this can be fatal.”<sup>76</sup>

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72. *See id.*

73. I.R.C. § 512(b)(13)(D) (2006); *see also* Jessica Pena & Alexander L.T. Reid, Note, *A Call for Reform of the Operational Test for Unrelated Commercial Activity in Charities*, 76 N.Y.U L. REV. 1855, 1866–67 n.47 (2001)

74. Posting of John Berger to Socialedge, <http://www.socialedge.org/discussions/business-models/archive/2007/11/08/the-for-profit-non-profit-hybrid-model#comments> (May 7, 2009, 23:08).

75. Posting of Laurinda to Socialedge, <http://www.socialedge.org/discussions/business-models/archive/2007/11/08/the-for-profit-non-profit-hybrid-model#comments> (May 7, 2009, 23:08).

76. Posting of Leigh Melander to Socialedge, <http://www.socialedge.org/discussions/business-models/archive/2007/11/08/the-for-profit-non-profit-hybrid-model#comments> (May 7, 2009, 23:08).

### B. *New Corporate Forms*

The recent breakdown of the financial system provides strong motivation to capitalize on the current attention to alternative approaches toward changing capitalism and the laws governing business entities. Fourth-sector entrepreneurs are taking valuable steps in that direction, but current legal regimes have stymied progress. In short, more is needed. In light of the current strong sentiment that capitalism “can be put to better use than serving greed, speculation and that miniscule percentage at the very top . . . [and that profit distribution should be] [] based also on human needs so that the social businesses created have a true purpose beyond simply profit,”<sup>77</sup> now is an opportune time to consider alternative legal models. Currently, several attempts have been made toward that end.

#### 1. *B Corporations*

Recognizing that the traditional conceptualization of the corporation constrains efforts to use that form to advance social good, efforts are underway to re-conceptualize the corporation in ways that would broaden the purposes that corporations could be organized to further. One such effort is the creation of “B corporations.”

The brainchild of Jay Coen Gilbert, B corporations (the B stands for benefit or beneficial), are corporations that choose to qualify under a certification system that designates them as socially responsible to consumers and investors.<sup>78</sup> B corporations agree to engage in “triple bottom line” accounting—focusing on social, environmental, and economic returns.<sup>79</sup> Prominent examples of such entities include Ben and Jerry’s, Burt’s Bees, and Numi Tea, among others.<sup>80</sup> To gain the B corporation designation (which is granted by B Lab<sup>81</sup>), a corporation must be incorporated in a state that has a constituency statute that allows directors to consider the interests of both investor and non-investor stakeholders, and amend its articles of incorporation to state explicitly that managers must consider the interests of employees, the community, and the environment.<sup>82</sup> B corporations must also pay B Lab one-tenth of one percent

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77. Posting of Vivian Norris de Montaigne to studyunus.net <http://studyunus.wordpress.com/2008/08/08/davos-2008-bill-gates-creative-capitalism-and-muhammad-yunus-social-business-vivian-norris-de-montaigne/#more-66> (Aug. 8, 2008).

78. See B Corporation.net, Understand Legal, <http://www.bcorporation.net/become/legal> (last visited Mar. 11, 2010).

79. See Mary Catherine O’Connor, B Corporation: A Way for “Good” Companies to Walk the Walk (Apr. 17, 2009), <http://www.triplepundit.com/2009/04/b-corporation-a-way-for-good-companies-to-walk-the-walk/>.

80. See B Corporation.net, Community, <http://www.bcorporation.net/community> (use “Find a B Corp” search box and enter Corporation’s name) (last visited Mar. 11, 2010).

81. B Lab is the 501(c)(3) non-profit that administers the B Corp.’s processes. O’Connor, *supra* note 79.

82. For example, the recommended language in New York for inclusion in a B corporation’s articles of incorporation states:

In discharging his or her duties, and in determining what is in the best interests of the Company and its shareholders, a Director shall consider such factors as the Director deems relevant, including, but not limited to, the long-term prospects and interests of

of corporate revenue and score at least forty out of one-hundred points on a survey B Lab administers to rate the corporation's adherence to social goals.<sup>83</sup>

The hope is that by adopting B corporation language in an entity's articles of incorporation, a small business will be less afraid to take on outside investors out of fear that those investors will insist on profit-maximization. The fate of pre-B corporation Ben & Jerry's is illustrative of the potential fate small, socially active corporations face. In 2000, the Dutch conglomerate Unilever offered to buy Ben & Jerry's.<sup>84</sup> Known for their socially conscious business stance, founders Ben Cohen and Jerry Greenfield resisted the offer and, with other investors, put together a counter-offer of their own at a lower price.<sup>85</sup> Shareholders of the publicly traded company sued and argued that corporate law mandated that the directors accept the higher offer.<sup>86</sup> The court agreed, and Unilever acquired Ben & Jerry's in April 2000 for \$326 million.<sup>87</sup>

Conversely, there are some potential problems with using B corporations to actively advance social good. Primary among these is that the B corporation "model" amounts to little more than a new certification scheme, rather than a new legal model for the corporate form. B corporations do not enjoy special tax status, and it is unclear how established corporate law principles would treat them. Questions about the legal

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the Company and its shareholders, and the social, economic, legal, or other effects of any action on the current and retired employees, the suppliers and customers of the Company or its subsidiaries, and the communities and society in which the Company or its subsidiaries operate, (collectively, with the shareholders, the "Stakeholders"), together with the short-term, as well as long-term, interests of its shareholders and the effect of the Company's operations (and its subsidiaries' operations) on the environment and the economy of the state, the region and the nation.

B Corporation.net, Legal Roadmap, <http://survey.bcorporation.net/become/legal.php> (click "State of Incorporation"; then scroll down to "New York"). Also specifically recommended for inclusion is language designed to preempt fiduciary duty claims:

Notwithstanding the foregoing, any Director is entitled to rely on the definition of "best interests" as set forth above in enforcing his or her rights hereunder and under state law, and such reliance shall not, absent another breach, be construed as a breach of a Director's fiduciary duty of care, even in the context of a Change in Control Transaction where, as a result of weighing other Stakeholders' interests, a Director determines to accept an offer, between two competing offers, with a lower price per share.

*Id.*

83. For more information on the requirements for becoming a B corporation, see B Corporation.net, Become, <http://www.bcorporation.net/become> (last visited Mar. 11, 2010).
84. See Posting of Dave Marino-Nachison to The Motley Fool, *A Happy "Ending" for Ben & Jerry's?*, <http://www.fool.com/news/foolplate/2000/foolplate000412.htm> (Apr. 12, 2000); Posting of Richard McCaffrey to The Motley Fool, *Ben & Jerry's Final Chapter?*, <http://www.fool.com/news/2000/quicknews000329.htm> (Mar. 29, 2000).
85. See Marino-Nachison, *supra* note 84.
86. Hannah Clark Steinman, *A New Kind of Company, Inc.*, July 1, 2007, <http://www.inc.com/magazine/20070701/priority-a-new-kind-of-company.html>.
87. See *id.*

implications of the form include such issues as whether the suggested language in a B corporation's articles of incorporation would provide it any legal protection if the corporation and its directors were sued for putting non-investor stakeholder interests ahead of, or even on par with, shareholder interests. Will B corporation election and certification protect directors in such a situation, or will it create only contractual duties running from directors to stakeholders while leaving traditional fiduciary duties unaffected? Can shareholders of B corporations change the law applicable to their entity through the recognition of non-investor stakeholder interests, or must the corporate law of the state in which such an entity incorporates be modified to expressly allow such a shift? Would managers of current public corporations be able to generate sufficient voting support to seek B corporation certification? Will incorporation in a jurisdiction that allows directors to consider non-investor stakeholder interests legally protect a B corporation's business decisions in a jurisdiction that does not recognize non-investor interests as legitimate business considerations?

In addition, B corporations will be limited in their access to capital insofar as investors seeking maximum economic returns will direct their money elsewhere. Further, it may be difficult to maintain focus on the social objectives that constitute part of the corporation's mission. "Legacy drag" may set in as once the original founder of the B corporation is no longer the driving force behind its operations, the focus of concern may change. To the extent that B corporations articulate general statements about their missions and strive to "further community interests," for example, the goals may become less certain and present more opportunity for intra-corporation disagreement.

Finally, even if B corporation certification became popular and the legal issues surrounding them were resolved, such entities would still be limited to the "do no harm" type of social responsibility. While B corporation certification broadens the interests corporate managers may consider when making business decisions, it does not remove their need to show ultimate benefit to the corporation. Thus, while B corporations have the potential to quiet some of the CSR debate, they do not solve the problem of harnessing the power of corporations to actively advance social good.

## 2. *L3C's: Low-Profit Limited Liability Company*

Another new corporate form created to allow entities to advance social good is the L3C, or low-profit limited liability company. Standing between for-profit and non-profit entities, L3Cs are organized in the same way as an ordinary LLC, but are designated as low-profit organizations with explicit charitable or educational goals.<sup>88</sup> L3Cs are for-profit in the sense that investors are entitled to distributions and any appreciation in their investment, but non-profit in the sense that they are organized primarily for charitable purposes.<sup>89</sup>

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88. See Americans for Community Development, About L3C, <http://americansforcommunitydevelopment.org/about.html> (last visited Mar. 11, 2010).

89. See *id.*

L3Cs were first enacted by Vermont in 2008, and have spread to other jurisdictions,<sup>90</sup> with efforts underway to enact them in other states and on the federal level.<sup>91</sup> To qualify as an L3C under Vermont law (which is representative of other jurisdictions), an entity must include the L3C designation in its name and in its articles of organization.<sup>92</sup> The basic intent of the L3C characterization is to signal to foundations that the entity intends to conduct its activities in a manner that would qualify it to receive program-related investments<sup>93</sup> without the need to obtain a private letter ruling.<sup>94</sup> In this way, L3C designation is comparable to B Corporation certification—it signals to the market that the entity, although organized using a for-profit, corporate form, will engage to some degree in the promotion of social goals.

Basic organization in the LLC form provides advantages of organizational flexibility while maintaining a recognized business model. Beyond that, the operating agreement of an L3C can be drafted to include express provisions regarding the social mission of the organization, return on investment, and use of proceeds.<sup>95</sup> Further, an L3C's members can agree that interests other than profit-maximization will control the entity's operation.<sup>96</sup> The operating agreement also may contain restrictions on the transferability of shares, ensuring that only those who share the social mission of the L3C become involved with the enterprise.<sup>97</sup> Finally, the methods of organization and governance structure of L3Cs encourage their social agenda. L3Cs are commonly formed by the foundations who wish to use them to place PRIs.<sup>98</sup> Thus, foundations are the members of the L3C and under LLC law may elect the entity's board. Thus, members retain the ability to ensure that the goals of the L3C are honored and that the board does not co-opt the process and focus only on profit-maximization.

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90. See, e.g., VT. STAT. ANN. tit. 11, § 3001(27) (2008); MICH. COMP. LAWS § 450.4102(m) (2009); WYO. STAT. ANN. § 17-15-102(a)(ix) (2009).

91. For updated information about efforts to enact L3C legislation, see Nonprofit Law Blog: L3C—Developments & Resources, <http://www.nonprofitlawblog.com/home/2009/03/l3c-developments-resources.html> (last visited Mar. 11, 2010).

92. VT. STAT. ANN. tit. 11, § 3005(a)(2).

93. For a full description of program-related investments, see *supra* text accompanying notes 50–53.

94. See The L3C Status: Groups Explore Structure that Limits Liability for Program-Related Investing, <http://www.thefreelibrary.com/The+L3C+status:+groups+explore+structure+that+limits+liability+for...-a0208056187> (last visited Mar. 11, 2010). Private letter rulings are rulings from the IRS that an entity is in compliance with its regulations. IRS.gov, Exempt Organizations—Private Letter Rulings and Determination Letters, <http://www.irs.gov/charities/charitable/article/0,,id=123213,00.html> (last visited Mar. 11, 2010). While not required under the law, the danger of non-compliance is great enough that it is generally recommended to seek such a ruling before engaging in PRIs. See *id.*

95. See DEL. CODE ANN. tit. 6, § 18-101(7) (2009).

96. See DEL. CODE ANN. tit. 6, § 18-106(a) (2009).

97. See DEL. CODE ANN. tit. 6, § 18-702 (2009).

98. Robert M. Lang, Jr., *The L3C: The New Way to Organize Socially Responsible and Mission Driven Organizations* 5, A.L.I.-A.B.A. Course No. SN036, at 2 (2007).

In time, L3Cs may become a viable method for some non-profits to effectively bridge the for-profit/non-profit divide.<sup>99</sup> However, at present, recognition of the form is limited in scope. While it may be true that once one state accepts the L3C as a new corporate form that form would be valid in all states, it is not necessarily also true that the law would know how to deal with them. Additionally, there are indications that state tax regulators will not simply accept that an L3C designation means that the entity bearing that title qualifies as an entity capable of making PRIs. Private letter rulings may still be required to ensure that an entity formed under the L3C label complies with the requisite tax formalities. Further, L3Cs may expand the role of private foundations but may still be limited in the amount of active advancement of social good they can achieve.

## II. LEGISLATIVE ATTEMPTS TO CREATE NEW CORPORATE FORMS

As the preceding discussion shows, current legal regimes pose significant problems for entrepreneurs who want to operate a for-profit business that seeks to further social good rather than simply maximize economic return for its shareholders. In recognition of this, several legislative efforts at changing the legal regime have been considered and in some cases adopted.

### A. Efforts in the United States

Several states have made efforts to statutorily allow business entities to have a broader mandate than the maximization of profit for their shareholders. As an example, in 2006, Minnesota proposed the Minnesota Responsible Business Corporation Act (the “Act”).<sup>100</sup> Under the Act, a corporation could choose to select a socially responsible status and be designated a Socially Responsible Corporation by including the letters “SRC” instead of the standard “Inc.” after its corporate name.<sup>101</sup>

Under the Act, directors of SRCs would be required to consider the interests of stockholders, employees, customers, creditors, and the “public interest.”<sup>102</sup> The Act defines “public interest” as “the general public well-being of present and future generations including, but not limited to, the economy, natural environment, public health, public safety, human rights, educational and other human development

99. Proponents of L3Cs argue that the business model

[P]rovides for better utilization of foundation and trust funds and gives them a reasonable control of how their money is used . . . [and] provides for reuse of the money and can lead to capital gains and the generation of substantial profits in the long run. It is more in keeping with the American free enterprise system . . . and can [] get many operating nonprofits out from under the morass of regulation that surrounds nonprofits.

Robert M. Lang, Jr., *The L3C: The New Way to Organize Socially Responsible and Mission Driven Organizations*, A.L.I.-A.B.A. Course No. SN036, at 5 (2007).

100. H.F. 4161 § 1, 2005 Leg., 84th Sess. (Minn. 2006); S.F. 1153 § 1, 2007 Leg., 85th Sess. (Minn. 2007).

101. Minn. H.F. 4161 § 4(d); Minn. S.F. 1153 § 4(d).

102. Minn. H.F. 4161 § 6; Minn. S.F. 1153 § 6.

opportunities, and the general well-being of the local, state, national, or world community.”<sup>103</sup> SRCs also must allow employees to nominate and elect twenty percent of the board of directors with another twenty percent of the board reserved for directors selected by the elected board members to represent the public interest.<sup>104</sup> If an SRC elects to trade publicly, it must publish a “Public Interest Report” together with its annual report, and must train its directors, officers, and employees regarding their duties to stakeholders.<sup>105</sup> Importantly, the Act explicitly removes the fiduciary obligation of directors and officers to act solely in the interests of shareholders, thus removing the profit-maximizing mandate.<sup>106</sup>

While it has not yet been enacted, the Act recognizes the current difficulties in trying to harness the power of capitalism to further social goals. If enacted, the Act would eliminate the need to engage in the CSR debate. It is not free from problems, however. Corporations choosing the SRC designation may suffer from a lack of flexibility, including constraints on future action and limited access to credit. The cost and uncertainty associated with external regulation (even if voluntarily accepted) also may limit the effectiveness of such legislation.

Even if legislation similar to the Act was widely enacted and corporations eagerly signed on, the Act would not facilitate the creation of businesses exclusively dedicated to the active advancement of social welfare. Thus, while the Act represents a potential step toward allowing corporate executives to consider objectives beyond profit-maximization, it does not go as far as needed to allow businesses to operate solely for purposes other than shareholder benefit.

### B. *International Efforts*

One of the first regulatory efforts to bridge the for-profit/non-profit divide occurred in Britain. In 2005, the United Kingdom enacted legislation allowing for the creation of community interest companies (“CICs”).<sup>107</sup> These entities are a new type of company “that balances the flexibility of the traditional for-profit limited company model with the recognition that social enterprises involve stakeholders other than shareholders, whose interests deserve legal protection currently lacking in U[nited] K[ingdom] law.”<sup>108</sup>

103. Minn. H.F. 4161 § 2 subd. 2; Minn. S.F. 1153 § 2 subd. 2.

104. Minn. H.F. 4161 §§ 6(a)–(c); Minn. S.F. 1153 §§ 6(a)–(c). The elected directors must make their selections after consultation with people or groups representing the public interest. Minn. H.F. 4161 §§ 6(a)–(c); Minn. S.F. 1153 §§ 6(a)–(c).

105. Minn. H.F. 4161 § 9 subd. 2; Minn. S.F. 1153 § 9 subd. 2.

106. Minn. H.F. 4161 § 8; Minn. S.F. 1153 § 8. For a discussion of the Act, see Susan MacCormac, *The Emergence of New Corporate Forms*, Center for Policy Development, Jan. 15, 2008, <http://cpd.org.au/article/emergence-new-corporate-forms>.

107. The designation “Community Investment Company” was introduced by the Companies (Audit, Investigations and Community Enterprise Bill) Bill, 2003–04, H.L. Bill 142 (Gr. Brit.).

108. Paul Bater, *United Kingdom: The Community Interest Company Proposal*, 1 INT’L J. CIV. SOC’Y L. 114, 115 (2003).

To qualify as a CIC, a firm must: (1) have a purpose regarded by a reasonable person as beneficial to the community, and (2) ensure that benefits provided will not be limited to an unduly restricted group.<sup>109</sup> Under UK company law, CICs may seek financing from any source and do not have any special tax-exempt status.<sup>110</sup> They are regulated by the CIC Regulator (a new office of the Registrar of Companies).<sup>111</sup> The Regulator screens companies seeking a CIC designation and monitors their activities through the required submission of an annual community interest report, which must include details about payment of dividends, amounts paid to directors, and how the CIC has furthered its mission with regard to its stakeholders.<sup>112</sup>

CICs may operate as a for-profit business, by, for example, selling products for profit and paying dividends to individual shareholders. At the same time, their explicit purpose is the active advancement of social good, locating them closer to the non-profit end of the spectrum. Thus, CICs are a specific attempt to solve the problems encountered by businesses wishing to harness the power of capitalism for social good.

CICs are an important step forward, and may serve as a model for other jurisdictions seeking to expand the universe of business entities. CICs are not free from problems, however. One impediment, for example, is a unique aspect of CIC regulation known as “asset lock.” Pursuant to asset-lock regulation, any CIC asset must be either retained in the CIC to further the community purpose for which the entity was formed, or transferred by the CIC according to one of the following requirements: (1) the transfer is made for full consideration so that the CIC retains the value of the assets transferred; (2) the transfer is made to another asset-locked body, which is specified in the CIC’s memorandum or articles of association; (3) the transfer is made to another asset-locked body with the consent of the CIC regulator; or (4) the transfer is otherwise made for the benefit of the community.<sup>113</sup>

The asset lock bars a CIC from distributing any assets or profits to their members except to the extent permitted when the CIC issues equity.<sup>114</sup> The net effect of the asset-lock requirement is that once a CIC owns assets, those assets will forever be locked into social or charitable purposes.<sup>115</sup> This limitation on a CIC’s use of its

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109. H.L. Bill 142 (Gr. Brit.).

110. *Id.*; Bater, *supra* note 108, at 116.

111. Bater, *supra* note 108, at 114.

112. REGULATOR OF COMMUNITY INTEREST COMPANIES, INFORMATION PACK, COMMUNITY INTEREST COMPANIES 37–38 (2009) [hereinafter CIC INFORMATION PACK], <http://www.cicregulator.gov.uk/CICleaflets/CIC%20INFORMATION%20PACK%20V00.04%20Final.pdf>.

113. *Id.* at 14.

114. *Id.* at 15.

115. See Ian Dawson, *The Rule Against Inalienability—A Rule Without a Purpose?*, 26 LEGAL STUD. 414, 415 (2006) (U.K.) (arguing against asset lock). “Asset lock’ is a general term used to cover all the provisions [of the Act] designed to ensure that the assets of the CIC (including any profits or other surpluses generated by its activities) are used for the benefit of the community.” CIC INFORMATION PACK, *supra* note 112, at 14.



capital may inhibit potential investors in such entities. Moreover, courts in other jurisdictions may view asset lock as an unwarranted restraint on capital. Thus, while CICs are an important innovation and a creative step toward bridging the for-profit/non-profit divide, they are not an ideal solution to the problem of how businesses can be best organized to work for the social good.

### III. A NEW BUSINESS ENTITY: THE “SOCIAL BUSINESS”

As the preceding discussion demonstrates, while there has been some movement away from the notion that businesses must operate solely to maximize profits for their shareholders, there is not yet an ideal business model for the active advancement of social good. Instead of tinkering with existing models, perhaps now is the time to “carpe crisis”—to capitalize on the breakdown of capitalism and conceptualize a new form of business that would allow us to achieve that goal without the current constraints. The meltdown in our financial system showed that the current market system is not perfect, and created an opportunity to broaden our conceptualization of the nature and purposes of corporations. To be clear, not every corporation can or should be organized to actively advance the social good, but certainly there should be room in our system to accommodate investors who choose to participate in such ventures.

The idea that corporate power can be harnessed to directly address a social problem is currently being tested by Mohammad Yunus, the founder of the Grameen Bank (the “Bank”) and the winner (together with the Grameen Bank) of the 2006 Nobel Peace Prize “for their efforts to create economic and social development from below.”<sup>116</sup> Dr. Yunus advocates for, and is attempting, the creation of “social businesses.”<sup>117</sup>

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116. Press Release, Nobel Foundation, The Nobel Peace Prize for 2006, (Oct. 13, 2006), [http://nobelprize.org/nobel\\_prizes/peace/laureates/2006/press.html](http://nobelprize.org/nobel_prizes/peace/laureates/2006/press.html).

117. Skeptics should take note that Dr. Yunus and the Grameen Bank showed similar innovation when they developed the notion of microcredit. Microcredit was initially viewed as a “radical experiment.” See Isobel Coleman, *Defending Microfinance*, 29 FLETCHER FORUM OF WORLD AFFAIRS 181, 182 (2005). The experiment began in the 1970s. Kenneth Anderson, *Microcredit: Fulfilling or Belying the Universalist Morality of Globalizing Markets?*, 5 YALE HUM RTS. & DEV. L.J. 85, 92 (2002). By the 1980s it was seen as a better alternative to traditional development programs that generally involved large-scale, capital-intensive infrastructure projects such as dams and power plants, funded by large-scale international financial institutions such as the World Bank. *Id.* Projects funded under this “top-down” bureaucratic approach had numerous flaws. *Id.* They were often co-opted by the governments whose populations were intended to benefit from the project, were largely designed and implemented without the participation of the target populations, and often not only failed to achieve their desired result, but caused serious adverse consequences in the communities in which they were implemented. *Id.*

In contrast to this top-down approach, microcredit reaches target populations directly and provides the poor with access to markets through the provision of credit, capital, and training. *Id.* at 86. Its success is attributable to many factors, chief among them is its utilization of market mechanisms to achieve its aims. *Id.* at 87. Microcredit “explicitly uses market incentives to create a credit market for the poor . . . characterized by two features: readily available funds and repayment requirements.” *Id.*

From its humble beginnings, microcredit has grown exponentially and has gained currency across the political spectrum and with international institutions, including those that at one time relied exclusively

*A. The Basics of Social Businesses*

The term “social business,” as used by Dr. Yunus, takes a slightly different meaning from the alternative business models considered thus far. As conceived by Dr. Yunus, certain precepts must hold true for a business to consider itself “social.” At its core, a social business must carry on a viable enterprise.<sup>118</sup> It must identify and fill a market need for goods or services.<sup>119</sup> Unlike a traditional business, however, a social business must be created and run for the express purpose of pursuing specific, articulated social goals, rather than maximizing profit.<sup>120</sup> A social business must behave as an ordinary market participant, acting in competition with all players.<sup>121</sup> It must, at a minimum, cover its costs.<sup>122</sup> Ideally, it will generate profits.<sup>123</sup> Unlike a traditional business, however, dividends paid to investors cannot exceed the amount of their investment—i.e., investors cannot profit from the company’s proceeds; rather all proceeds in excess of that required to repay investors should be used to further the business enterprise and its social goal.<sup>124</sup>

The “defining objective” of a social business must be to reverse the traditional profit-maximizing goal and replace it with benefit maximization.<sup>125</sup> Those social benefits may be created in various ways. First, a social business may be run with the express purpose of providing goods and services to communities that might otherwise lack access to them. An example of this kind of social business is one that provides health care to under-served communities.<sup>126</sup> To qualify as a social business, the venture would have to cover its costs, provide care for a disadvantaged group, and offer no more return to its shareholders than their original investment.<sup>127</sup>

A second form of social business is one run by a disadvantaged group, with the express purpose of providing skills, training, and gainful employment to the managing population.<sup>128</sup> Unlike the social business run to provide a market need to

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on traditional development models. Coleman, *supra*, at 182. Some of the high points in the rise of microcredit, include but certainly are not limited to, the following examples: in 1998, The United Nations General Assembly declared that 2005 would be the International Year of Microcredit, and in 1999, the World Bank, in conjunction with a consortium of international lending groups, created the Consultative Group to Assist the Poor, which now operates with a multi-million dollar budget. *Id.* at 183.

118. MUHAMMAD YUNUS, CREATING A WORLD WITHOUT POVERTY: SOCIAL BUSINESS AND THE FUTURE OF CAPITALISM 21–23 (2007).

119. *Id.*

120. *Id.* at 23.

121. *Id.* at 26.

122. *Id.* at 22.

123. *Id.* at 24.

124. *See id.* at 23–24.

125. *Id.* at 23.

126. *See id.* at 29.

127. *See id.* at 23–28.

128. *Id.* at 28.

disadvantaged populations, this second model of social business could be run for any purpose, so long as it uses its profits to further its existence and continue its mission of empowering its stakeholders.<sup>129</sup> As noted below, this model of social business presents some challenges to the original conceptualization—while social businesses in the purest sense are non-loss, non-dividend enterprises, this second model contemplates the payment of dividends to its stakeholders as they are the targets of the social objectives of the enterprise.<sup>130</sup>

Although social businesses have much in common with both “traditional” businesses and with philanthropic ventures, they differ in some fundamental aspects. Charities distinguish themselves from traditional businesses by expressly focusing on social needs that for-profit businesses largely disregard. Social businesses share this focus, but unlike charities, must cover their costs and may not be dependent on continual injections of funds from outside sources.<sup>131</sup> Further, while donors to charities expect no return other than the intangible feeling of “goodness” they may experience when making a donation, investors in a social business can and should expect the return of their investment.<sup>132</sup> While it is likely that many will rapidly re-invest those funds in the same or another social enterprise, that decision remains with the investor.<sup>133</sup> Thus, while those investors will not be able or entitled to get any more than their original investment back, they will benefit both from the “goodness” experienced from aiding a social goal and from the return of their investment capital. As with a traditional business, there is no guarantee that investors will be able to recoup their investment—market risk always exists. Social businesses should be run with the expectation that they will return investors’ capital, and the time frame for doing so will be detailed in the investment prospectus for each entity.<sup>134</sup>

These aspirational goals of a social business may leave skeptics doubting that such an enterprise could ever exist. While questions about the model persist and many issues remain to be explored, the model has already been put to the test.

### *B. The Example of Grameen Danone Foods*

The first “social business” attempted using Dr. Yunus’s model was Grameen Danone Foods Limited (“GDFL”). Groupe Danone and Grameen Bank jointly founded GDFL with the objective of providing fortified yogurt to under-nourished children in Bangladesh.<sup>135</sup> In March 2006, the parties entered into a memorandum of understanding (“MOU”) in which they agreed that Danone and a group of four Grameen companies would split fifty-fifty the total approximated \$1.1 million

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129. *Id.* at 28–29.

130. *Id.* at 24–29.

131. *Id.* at 22.

132. *Id.* at 23.

133. *Id.* at 24–25.

134. *Id.* at 24.

135. *See id.* at 132.

start-up cost.<sup>136</sup> The MOU stated expressly that GDFL was to be a social business with the mission of reducing poverty, bringing daily nutrition to the poor, and sharing the benefits with its community of stakeholders.<sup>137</sup> It called for GDFL to design a manufacturing and distribution model that drew local communities, including sourcing supply from local farmers and hiring local populations to staff the plant and contribute to the creation of jobs through its distribution network.<sup>138</sup> The MOU further stated that the business was to be run to incur no losses and to generate a profit sufficient to repay the initial investments of the Danone and Grameen companies.<sup>139</sup> In a deviation from the pure form of no-loss, no-dividend model of a social business, the parties agreed to pay a one percent dividend “as a way of publicly recognizing the ownership of [the] company and to make it possible for Danone to show a figure in the appropriate line of its balance sheet.”<sup>140</sup>

GDFL opened its first yogurt plant in Bogra, Bangladesh in March 2008.<sup>141</sup> The facility aimed to produce 3000 tons of low cost, highly nutritious yogurt per year from milk supplied by 300 micro-farms established with credit from Grameen Bank.<sup>142</sup> It was also announced that additional financing would be provided to expand capacity at the Bogra plant and to open a second facility near Dhaka.<sup>143</sup>

Like any business, GDFL confronted many challenges in attempting to run a successful social venture. The company encountered distribution problems because of an untrained sales force, and lacked the refrigeration necessary to maintain the product in its optimal state.<sup>144</sup> Additionally, the profit margin on the product was extremely low, making it difficult to motivate the sales force.<sup>145</sup> After one year of operation, GDFL had trouble generating enough profit to cover its costs,<sup>146</sup> an

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136. *See id.* at 144.

137. *Id.* at 144–45.

138. *Id.* at 145.

139. *Id.* at 138.

140. *Id.* at 138. Mohammad Yunus notes that “[n]ow, in hindsight and with further thought, I am in favor of removing the dividend clause . . . If Danone agrees, we’ll do that, to make it match with the definition of social business as . . . a non-loss, non-dividend business.” *Id.*

141. Press Release, Groupe Danone, First Board Meeting of the French Risk Mutual Fund danone communities, (Mar. 2008), <http://www.danone.com/en/news/focus/world-wetlands-day.html>.

142. For more details on the operations of the enterprise, see Yunus, *supra* note 118, at 129–48; Carol Matlack, *Danone Innovates to Help Feed the Poor*, BUSINESSWEEK, Apr. 28, 2008, [http://www.businessweek.com/globalbiz/content/apr2008/gb20080428\\_971498.htm](http://www.businessweek.com/globalbiz/content/apr2008/gb20080428_971498.htm); Sheridan Prasso, *Saving The World with a Cup of Yogurt*, FORTUNE, Jan. 29, 2007, [http://www.sheridanprasso.com/fortune\\_yunus\\_yogurt.htm](http://www.sheridanprasso.com/fortune_yunus_yogurt.htm).

143. Press Release, Groupe Danone, First Board Meeting of the French Risk Mutual Fund danone communities, (Mar. 2008), <http://www.danone.com/en/news/focus/world-wetlands-day.html>.

144. For a full accounting of GDFL and its struggles, see Asad Kamran Ghalib & Farhad Hossain, *Social Business Enterprises—Maximising Social Benefits or Maximising Profits? The Case of Grameen-Danone Foods Limited* (Brooks World Poverty Institute, Working Paper No. 51, 2008), available at <http://www.bwpi.manchester.ac.uk/resources/Working-Papers/bwpi-wp-5108-abstract.pdf>.

145. *Id.* at 10.

146. *Id.*

essential attribute of a successful social business. While there are plans to address these problems,<sup>147</sup> the long-term success of GDFL cannot be predicted at this point.

Despite the uncertain future of GDFL, both Grameen and Danone remain committed to the idea of social business. Grameen is exploring several other social ventures, including a joint venture with Intel Corporation to address the needs of the rural poor through information technology.<sup>148</sup> Grameen also began operating a second social business, the Grameen GC Eye Care Hospital, which is now in operation in Bogra and Barisal.<sup>149</sup>

### C. *The Potential of Social Businesses*

The burgeoning interest in fourth-sector enterprises and the increasing attention being paid to “creative capitalism” demonstrate that there is a large pool of potential investors and likely participants ready to form social businesses. Entrepreneurs who seek to create new businesses will prefer such ventures over passively donating their monies to charity. Philanthropists may prefer to invest in a social business rather than traditional charitable vehicles because they will optimally receive their initial investment back, and can then re-use that capital to invest in another social business or for other purposes. The ability of social businesses to return an investor’s original capital makes the model a superior option.

Noteworthy in this regard is the degree of seriousness with which Danone is committed to the idea of social businesses. Danone has created a new unit, danone.communities, with the express purpose of funding social businesses,<sup>150</sup> and signaling that while GDFL was the company’s first project it is not intended to be its last. The new entity is studying partnerships with local Asian and African non-governmental organizations based on the model and experience of GDFL.<sup>151</sup> Contrary to those who might argue that social businesses will be unable to attract top-flight directors and investors, danone.communities launched with a €20 million

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147. *Id.*

148. Press Release, Intel, Grameen Announce Joint Business Venture to Fuel Social and Economic Development Opportunities Empowered by Technology (May 19, 2008), [http://www.grameensocialbusiness.org/index.php?option=com\\_content&view=category&layout=blog&id=47&Itemid=90&limitstart=5](http://www.grameensocialbusiness.org/index.php?option=com_content&view=category&layout=blog&id=47&Itemid=90&limitstart=5).

149. Yunus Centre, Grameen GC Eye Care Hospital, <http://www.muhammadyunus.org/Social-Business/grameen-gc-eye-care-hospital/> (last visited Mar. 11, 2010).

150. Danone.communities is a product of the meeting between Franck Riboud, CEO of Danone, and Dr. Muhammad Yunus. “With danone.communities, we uphold a conviction: to invent business models that benefit the most disadvantaged populations.” <http://www.danonecommunities.com/fr/node/146> (last visited Mar. 12, 2010); Liam Black, *Pots of Gold*, THE GUARDIAN, Feb. 18, 2009, <http://www.guardian.co.uk/society/2009/feb/18/liam-black-bangladesh>. As an investment fund, danone.communities makes it possible to finance these new types of businesses that, thanks to Danone’s skills, have a lasting social impact. *Id.*

151. *See id.*

investment from Groupe Danone, a €30 million investment from institutional investors, and has attracted funds from the French Mutual Fund (“SICAV”).<sup>152</sup>

Moreover, it is also worth noting the composition of the board of directors of the French Risk Mutual Fund (“FCPR” or the “Fund”), also a danone.communities investor. The Fund’s board members come from many countries, professions, and areas of interest. Its members include Mohammad Yunus, Groupe Danone CEO Franck Riblut, the founder of Stonyfield Farm, the CEO of Credit Agricole, and the former Minister for Reconstruction & Development of South Africa.<sup>153</sup>

Social businesses will also attract those who are dissatisfied with the current model of capitalism and its emphasis on enriching a select few, giving them an option of investing in an entity that recognizes and utilizes the power of the corporate form to benefit more stakeholders than current corporate forms are willing or able to. Finally, the form will appeal to those people who simply want another weapon to levy at social problems that are currently not being solved by other means.

Clearly, not all businesses can or should be run as social businesses. However, there is room for creativity and flexibility in the role that corporations can play, and social businesses will allow those with the resources and the inclination to harness corporate power to advance the social good.

#### IV. CONCLUSION

The turmoil in our financial system provides an opportunity to rethink the basic structures under which our economic system has long functioned. The greed and dysfunction revealed by recent events shows that current models are far from perfect. While not advocating a radical overthrow of the existing system, perhaps we can take this opportunity to expand our universe and allow for the explicit recognition and creation of businesses that aim to address social problems. Economics is after all a social science. Broadening our understanding of the role corporations can play and the goals to which they should aspire will allow us to return the social aspect to that science and to harness the power of capitalism to actively advance social good.

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152. Up to ten percent of the assets of that Fund are invested in social businesses through the French Risk Mutual Fund. Press Release, Groupe Danone, First Board Meeting of the French Risk Mutual Fund danone.communities (Mar. 2008), <http://www.danone.com/en/news/focus/world-wetlands-day.html>.

153. *See id.* for a complete list of the Board of Directors, together with a short biographical sketch.